In the Supreme Court

OF THE

United States

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No. 267

THE BANK OF CALIFORNIA NATIONAL ASSOCIATION, Executor of the Estate of Margaret Eyre Girvin, Deceased,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, the Bank of California National Association, as Executor of the Estate of Margaret Eyre Girvin, deceased, San Francisco, California, prays

that a writ of certiorari may issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit entered therein April 11, 1946, in a case between the above named parties docketed therein as No. 11088. The said decree reversed the judgment of the Tax Court of the United States of December 7, 1944 (R. 29-34), which had determined a transfer of property as one not intended to take effect at death, under the Federal Estate Tax law. A petition for a rehearing was denied by the Circuit Court of Appeals on May 22, 1946. (R. 60.)

OPINION BELOW.

The findings and opinion of the Tax Court are reported in 3 T.C.M. 1290 and printed in the record. (R. 29-33.) The opinion of the Circuit Court of Appeals is reported in 155 Fed. (2d) 1, and is printed in the record. (R. 54-59.)

JURISDICTION.

This Court has jurisdiction to review said decree under U. S. Code, Title 28, Sec. 347.

This application is made within three months after the entry of the order of the Circuit Court of Appeals denying a rehearing, as required by U. S. Code, Title 28, Sec. 350.

QUESTIONS PRESENTED.

The decision of the Circuit Court of Appeals, reversing the judgment of the Tax Court of the United States, presents the following questions:

1. Was the property which the settlor, Mrs. Girvin, transferred in trust in 1924 to the Bank of California, N. A., as trustee "property in respect to which [she] has created a trust in contemplation of or *intended* to take effect in possession or enjoyment at or after [her] death", and therefore taxable, for estate tax purposes, as a part of her estate when she died in 1941, within the meaning of Section 302(c) of the Revenue Act of 1924?

2. In determining whether such property so transferred is taxable,

(a) Should the construction assigned to Section 402(c) of the Revenue Act of 1918, 40 Stat. 1096, by this Court in *May v. Heiner,* 281 U. S. 238, 50 Sup. Ct. 286, be the construction assigned to Section 302(c) of the Revenue Act of 1924, when the pertinent parts of both read as follows:

> "To the extent of any interest therein of which the decedent has at any time made a transfer or with respect to which he has at any time created a trust in contemplation of or *intended* to take effect in possession or enjoyment at or after his death" (emphasis ours); and

(b) Should not the same construction as that made in *May v. Heiner* be assigned, as well, to the pertinent part of Section 811(c) of the Internal Revenue Code, reading as follows:

> "To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or *intended* to take effect in possession or enjoyment at or after his death" (emphasis ours)

in determining the taxability for estate tax purposes of Mrs. Girvin's trust of 1924; and should not every other portion of Section 811(c) I.R.C. which follows be disregarded, (reflecting, as they do, the amendments made to Section 302(c) of the Revenue Act of 1926 by the Joint Resolution of March 3, 1931 and by Section 803(a) of the Revenue Act of 1932)?

3. Have the decisions of this Court in *May v. Heiner,* supra, or in *Hassett v. Welch,* 303 U. S. 303, 58 Sup. Ct. 559 been overruled in whole or in part by implication in any of the later decisions of this Court?

4. Do the facts of the case of the petitioner herein bring it within the compass of the decisions of this Court in *May v. Heiner* and *Hassett v. Welch,* supra?

5. Would not any legislative attempt to give a retroactive effect to the aforesaid amendments of Section 302(c) of the Revenue Act of 1926, affecting the taxability of property, constitute a deprivation of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The statutes involved are the Revenue Act of 1918 Sec. 402(c), 40 Stat. 1096, the Revenue Act of 1924, Sec. 302(c), 43 Stat. 304, the Revenue Act of 1926, Sec. 302(c), 44 Stat. 71 as amended by Joint Resolution of March 3, 1931, ch. 454, 46 Stat. 1516, and as amended by the Revenue Act of 1932, Sec. 803(a), 47 Stat. 279 and the Internal Revenue Code Sec. 811(c), 53 Stat. 120, and Constitution, 5th Amendment. The relevant parts of these statutes and of the Constitution 5th Amendment are set out in the appendix, infra, (pp. i-iv).

STATEMENT.

The petitioner herein petitioned the Tax Court of the United States for a redetermination of a proposed deficiency of $14,344.29 in estate taxes, asserted by the respondent. In proposing such deficiency and in determining the asserted value of the net estate of the above named decedent, both for the basic and additional estate taxes imposed by the applicable revenue acts, the respondent included in the gross estate of said decedent the value of the corpus of an absolute and irrevocable transfer in trust, made by the decedent under date of June 26, 1924, and not made by her in contemplation of death, (sometimes in the record referred to as "the trust established September 14, 1925"). In this transfer, except as she reserved the income therefrom to herself for life, Mrs. Girvin made no other reservations, but on the contrary she provided therein for remainders over.

This deed of June 26, 1924 effected a transfer to the Bank of California, N. A., in trust of Mrs. Girvin's half of the community property of herself and her husband, Richard Donald Girvin, to which she succeeded on his death in April 1924. Her deed was made the day following the admission of his will to probate (R. 17, 18). After making certain specific bequests (R. 23) Mrs. Girvin's husband by his will had devised and bequeathed the residue of his estate to the Bank of California, N. A., in trust to pay the income therefrom to his wife Margaret Eyre Girvin during her life and after her death to divide the trust fund in certain unequal shares between his son, Richard Girvin, and his daughter, Lee Girvin Tevis; "Provided that should either of them die in the lifetime of my said wife, leaving issue at her death such issue shall take the share which their parent would have taken and if more than one in equal shares. Provided further that should either of my said children die in the lifetime of my said wife without issue then I direct that on the death of my said wife, the survivor shall take the whole of the trust fund absolutely" (R. 24). At the time of making her deed of June 26, 1924, Mrs. Girvin's son Richard and her daughter Lee were both married and the son Richard then had three children living and the daughter Lee then had two children living. When Mrs. Girvin died, nearly seventeen (17) years later, in 1941, she was survived by both her said children and by her aforesaid five grandchildren

(R. 26). The transfer of her share of said community property so made by Mrs. Girvin to the Bank of California, N. A., in trust paralleled the trust created by her husband in his will. It did so in these general terms, "to have and to hold in trust, however, for the same uses and purposes as those declared and set forth in said will of [her husband] and for the term therein stated" (R. 21, 22).

After a trial of the issues raised, the Tax Court filed its opinion in which it found that Mrs. Girvin's transfer in trust of July 26, 1924, was not made in contemplation of death nor was it intended to take effect in possession or enjoyment at or after her death within the meaning of the estate tax law (R. 31-32). In that opinion the Tax Court concluded that "no part of the transferred property is includible in decedent's estate" (R. 33). In conformity with this opinion, and on the authority of *May v. Heiner*, 281 U. S. 238, 50 Sup. Ct. 286, the Tax Court entered its decision that there was no deficiency in estate taxes (R. 33-34). The Circuit Court of Appeals for the Ninth Circuit reversed that decision of the Tax Court (R. 50-60).

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in not following the decision of this Court in *May v. Heiner,* 281 U. S. 238, 50 Sup. Ct. 286;

2. The Court erred in not following the decision of this Court in *Hassett v. Welch,* 303 U. S. 303, 58 Sup. Ct. 559;

3. The Court erred in holding that the property which Mrs. Girvin transferred to the Bank of California, N. A., in trust by her deed of June 26, 1924, was property "in respect to which [she] has created a trust in contemplation of or intended to take effect in possession or enjoyment at or after [her] death", and therefore taxable for estate tax purposes, within the meaning of section 302(c) of the Revenue Act of 1924, as construed by this Court in *May v. Heiner,* supra, and in *Morsman v. Burnet,* 283 U. S. 783, 51 Sup. Ct. 343;

4. The Court erred in holding that the property which Mrs. Girvin transferred in 1924 as aforesaid was property of which she had "made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after [her] death", and therefore taxable for estate tax purposes within the meaning of section 811(c) I. R. C., as it is limited by the aforesaid decision of this Court in *May v. Heiner,* supra, and as it is affected by the decision of this Court in *Hassett v. Welch,* supra;

5. The Court erred in assuming and in effect deciding that by operation of law Mrs. Girvin might

become revested with the corpus of her trust, by outliving her two children and her five grandchildren for whom she had provided, and that such a chance was sufficient to give a testamentary character to her transfer and to indicate that it was her intention that her transfer was to take effect in possession or enjoyment at or after her death, within the meaning of section 302(c) of the Revenue Act of 1924, as construed in *May v. Heiner,* supra, or in *Morsman v. Burnet,* supra, or within the meaning of section 811(c), I. R. C. as limited by *May v. Heiner,* supra, and *Hassett v. Welch,* supra;

6. The Court erred in holding that this case was governed by the decisions of this Court in *Fidelity Co. v. Rothensies,* 324 U. S. 108, or *Commissioner v. Field,* 324 U. S. 113, or *Helvering v. Hallock,* 309 U. S. 106, which cases are clearly distinguishable from this case;

7. The Court erred in holding that this case was governed by the provisions of section 81.17 of Treasury Regulations 105 or by the Commissioner's construction set forth therein of the statutory phrase "a transfer * * * intended to take effect in possession or enjoyment at or after his death", because the Commissioner's construction of that statutory phrase (when applied to trusts or transfers made prior to March 3, 1931) was and is in conflict with the construction placed on that statutory phrase by this Court in *May v. Heiner,* supra, and later approved in *Morsman v. Burnet,* supra.

REASONS FOR GRANTING THE WRIT.

As a result of the foregoing errors the petitioner will be wrongfully and unjustly taxed if the decision of the Circuit Court of Appeals is not reversed by this Court. Aside from the private interest of the petitioner, there is a real public interest in the questions raised by this decision of the Circuit Court of Appeals, not only because of their bearing on many pending cases but also because of their bearing on general administrative procedure.

There is a sharp conflict between the construction placed by the Commissioner on the quoted statutory phrase, as it applies to trusts or transfers made prior to March 3, 1931, and the construction placed on that statutory phrase by this Court as it applies to those earlier trusts and transfers. To what extent can the Commissioner by his own regulations, amend, to his own liking, a tax law passed by the Congress, and, in doing so, conflict with a construction thereof made in the decisions of this Court?

Since the decision of the Circuit Court of Appeals, the Commissioner has amended Section 81.17 of Treasury Regulations 105. This amendment leaves that section still in conflict with the decisions of this Court and has only added to the existing confusion and uncertainty. An important question of federal law is involved in this case which should be settled by this Court so that the present confusion and uncertainty may be dispelled and any injustice corrected and avoided.

A further reason for granting the writ arises from the conflict in the decisions on the question raised by this case.

The Circuit Court of Appeals has decided a question of federal law in this case in a way which, we believe, is in conflict with the decisions of this Court applicable thereto, and particularly with the decision of this Court in *May v. Heiner,* supra.

The decision of the Circuit Court of Appeals for the Ninth Circuit in this case is in apparent conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Irving Trust Co.,* 147 Fed. (2d) 946, upon the same question.

All these reasons for granting the writ will be developed further in the supporting brief, which follows.

Wherefore It Is Prayed That this petition for a writ of certiorari be granted to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, reversing the decision of the Tax Court in this case.

Dated, San Francisco, California,
June 26, 1946.

Respectfully submitted,
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RANDELL LARSON,
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BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

1. THE CONFLICT WITH MAY v. HEINER.

In *May v. Heiner* the facts were that Pauline May had transferred certain securities to her trustees in trust to collect the income therefrom and to pay the net income to her husband, Barney May, during his life time, and thereafter to her during her life time and after her decease all the property in said trust, less expenses, was to "be distributed equally among" her four named children, "and, in case any of such children be deceased, then as such deceased child shall appoint by his or her last will and testament, or by other written instrument directed to the trustees, and duly witnessed, and, in default of such appointment, to the heirs of such deceased child per stirpes." (25 Fed. (2d) 1005.)

In determining the taxability of the May trust corpus for estate tax purposes the fact that the income reserved for her husband, Barney May, during his life time, would precede the income reserved to Mrs. May, the settlor, for her life time was not a factor in making the decision. There was always the chance that Mrs. May would survive her husband. There was always the chance, too, that none of Mrs. May's children would ever exercise the power of appointment given them by Mrs. May's transfer in trust. In determining the taxability of the May trust corpus for estate tax purposes the fact that Mrs.

May had vested her four children with certain powers of appointment was not a factor in making the decision. In the May trust, in default of any appointment, the share of a deceased child would go "to the heirs of such deceased child, per stirpes." Here the difference between the May trust and the Girvin trust is that in the May trust "the heirs" of the deceased remainderman may be the ultimate beneficiaries and in the Girvin trust the "issue" of the deceased remainderman or the surviving remainderman or his "issue" may be the ultimate beneficiaries. There was always the chance in the May case that Mrs. May might survive not only her husband, but her four children and all of their heirs (unless she herself by her local law could be an heir of her children). Whether Mrs. May could be an heir of her children or not there was, however, always the bare chance that by operation of law she might, in her life time, become so restored to an ownership in the corpus of her trust, as to be competent to transfer that corpus "inter vivos", subject to her life interest, or to make testamentary disposition thereof, effective at her death. That, however, was the May trust whose corpus, this Court declared in *May v. Heiner*, could not be included in the gross estate of Mrs. May for estate tax purposes, and so decided because her transfer in trust was "not intended to take effect in possession or enjoyment at or after [her] death" within the meaning of Section 402(c) of the Revenue Act of 1918.

Mrs. Girvin's trust, like Mrs. May's, was governed by a Revenue Act which for purposes of estate taxes provided for the inclusion in the gross estate of a deceased person any property at any time owned by him, "to the extent of any interest therein of which the decedent has * * * created a trust, * * * in contemplation of or intended to take effect in possession or enjoyment at or after his death." That is the exact wording of the Section 402(c) of the Revenue Act of 1918 which governed the May trust and that is the wording, too, of Section 302(c) of the Revenue Act of 1924 which governed the Girvin trust. These two trusts (if stripped down to their essential features, as they bear upon the question whether they were "intended to take effect in possession or enjoyment at or after his death", within the meaning of that statutory phrase in the Revenue Acts of 1918 or 1924), may then be compared as follows:

May Trust.	**Girvin Trust.**
A trust reserving the income to the settlor for life, with remainders over to her named children or their "heirs" per stirpes.	A trust reserving the income to the settlor for life, with remainder over to her named children or their "issue" or to her surviving child or his or her "issue".

This Court in *May v. Heiner* decided that the May trust was not a trust intended to take effect in possession or enjoyment at or after Mrs. May's death *within the meaning of Section 402(c) Rev. Act 1918.* The Circuit Court of Appeals for the Ninth Circuit has by its decision decided that the Girvin trust was

a trust intended to take effect in possession or enjoyment at or after Mrs. Girvin's death *within the meaning of Section 302(c) Rev. Act. 1924.*

This Court in *May v. Heiner* determined the meaning of the statutory phrase above quoted from the Revenue Acts of 1918 and 1924 and, until *May v. Heiner* is overruled, the construction given that statutory phrase must remain the law.

In its comments on *Fidelity Co. v. Rothensies,* 324 U. S. 108, 65 Sup. Ct. 508, and *Commissioner v. Field,* 324 U. S. 113, 65 Sup. Ct. 511, the Circuit Court of Appeals said, "In both these cases the settlor specifically retained the right to create a reversion in the settlor." The Circuit Court later declared, "we can see no distinction between the acquisition of the power to create a reversion in the settlor by a retained interest to be exercised by the settlor, after the deaths of all those holding the remainder interest, as in the *Fidelity* case, supra, and a reversion by operation of law arising upon such deaths." Elsewhere the Circuit Court placed an emphasis upon Section 81.17 of Treasury Regulations 105 and particularly on the last sentence of that section reading, "in such instances it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer." And finally the Circuit Court declared, "The decedent's transfer of the remainder interests was one taking effect at death, within the provisions of 811(c) of the Internal Revenue Code."

It seems clear that the decision of the Circuit Court of Appeals is in conflict with the decision of this Court in *May v. Heiner*. The Revenue Act which controlled the question of taxability in the May trust like the Revenue Act which controls the question of taxability in the Girvin case made the corpus of a trust created by the settlor taxable as part of his estate for estate tax purposes *when "intended* to take effect in possession or enjoyment at or after his death", and *within the meaning of that statutory phrase* as found in the two respective applicable Revenue Acts of 1918 and 1924. The only difference between the two applicable revenue acts is that it was Section 402(c) of the Revenue Act of 1918 which controlled the question in the May trust and it is Section 302(c) of the Revenue Act of 1924 which controls in the Girvin trust.

The applicable statute in this case is Section 302(c) of the Revenue Act of 1924 so far as taxability is concerned and not Section 811(c) of the Internal Revenue Code. Section 811(c) of the Internal Revenue Code we believe cannot control the taxability of the corpus of the Girvin estate, to any extent in which it substantively departs from or has added to or modified the provisions of Section 302(c) of the Revenue Act of 1924. Section 811(c) of the Internal Revenue Code is based on Section 302(c) of the Act of 1926 as modified by the Joint Resolution of March 3, 1931, or amended by the Revenue Act of 1932, and the changes effected by this legislation were held to have a prospective operation only by this Court in *Hassett v. Welch,* supra.

In *May v. Heiner* this Court had declared that the creation of a trust in which the settlor reserved the income for life to himself with remainders over did not indicate that the trust so created was "intended to take effect in possession or enjoyment at or after his death", within the meaning of Section 402(c) of the Revenue Act of 1918. Following the passage of the Joint Resolution of 1931 any trust created thereafter reserving the income therefrom to the settlor for his life was sufficient to make the corpus of such a trust taxable for estate tax purposes as part of the gross estate of the settlor, notwithstanding the remainders over. If this new feature in the revenue acts is to operate prospectively only then any trust made prior to 1931 is not taxable which falls within the compass of the decision in *May v. Heiner*. Such a trust cannot, so long as *May v. Heiner* remains law, be declared to be one "*intended* to take effect in possession or enjoyment at or after his death" merely because the settlor has reserved the income therefrom to himself for life with remainders over to living children, or their issue or to living children or their heirs. It is the testamentary *intention* of the settlor which is the factor that determines the taxability of the corpus of the trust, when created prior to March 3, 1931, not the form of the trust.

2. THE CONFLICT WITH OTHER APPLICABLE DECISIONS OF THIS COURT.

The decision of the Circuit Court of Appeals in the pending case is in our opinion in conflict with such decisions of this Court as *Klein v. United States,* 283 U. S. 231, 51 Sup. Ct. 398, *Helvering v. Hallock,* 309 U. S. 106, 60 Sup. Ct. 444, and the *Fidelity* and *Field* cases above noted. Those cases have all had some characteristic reservation or "string" which so reflected the testamentary *intention* of the settlor as to justify the factual conclusion that his transfer was intended to take effect in possession or enjoyment at or after his death.

The forerunner of *May v. Heiner* was *Reinecke v. Northern Trust Co.,* 278 U. S. 339, 49 Sup. Ct. 123. This decision, so far as transfers or trusts made prior to March 3, 1931 are concerned, has set the pattern which this Court has since followed to this time, except for the one departure from pattern which was corrected in *Helvering v. Hallock,* 309 U. S. 106. In the case of *Reinecke v. Northern Trust Co.* there were two trusts held taxable and five others held non-taxable under the Revenue Act of 1921, Sec. 402(c) which contained the same statutory phrase, hereinbefore quoted, that is found in the Revenue Act of 1918, Sec. 402(c), and was construed in *May v. Heiner.* In two trusts powers of revocation were expressly reserved and these reservations giving them a testamenetary character in fact, rendered them taxable. The absence of such reservations in the other five trusts with their life estates and remainders over rendered them non-

testamentary and therefore non-taxable. This distinction between taxability and non-taxability with regard to trusts made prior to March 3, 1931 has been recognized by the decisions of this Court, up to the present. The taxable trusts made prior to March 3, 1931, have been marked by some express reservation or "string", giving them a testamentary character in fact.

There is no such "string" or reservation in the Girvin trust. Her trust was irrevocable, without any reservations beyond a life estate in the income and with no power of amendment retained. Nor did it grant to any one any powers of appointment (R. 19-22). Under California law when her deed was made in 1924 and when it was given effect by the decree of final distribution of her husband's estate, entered on September 14, 1925, every trust was irrevocable unless the right to revoke the same was reserved therein. (Calif. Civil Code Section 2280.) Her transfer was made by deed dated June 26, 1924, the trust created therein was accepted by her trustee on the same date (R. 22). The transfer of Mrs. Girvin was intended to take effect upon the execution of her deed in June 1924. Since that date she acquired no interest in the corpus of that trust beyond the reserved life estate in the income therefrom and it did not lie in her power to acquire any interest therein. Her deed reflected no expectation or intention to acquire or control any interest in her trust corpus beyond securing the net income therefrom in her life time.

3. THE CONFLICT WITH THE DECISION IN COMMISSIONER v. IRVING TRUST CO. (2 C.C.A.).

We feel warranted in claiming, too, that the decision of the Circuit Court of Appeals for the Ninth Circuit in the petitioner's case is actually in conflict with the opinion of the Circuit Court of Appeals for the Second Circuit in *Commissioner v. Irving Trust Co.*, 147 Fed. (2d) 946. In the *Irving* case two trusts were involved one made October 22, 1927 and the other April 5, 1930. Though involving different parties, so far as their possible tax features were concerned, they were substantially similar. A transfer of property was made by the settlor to his trustee to pay out of the income therefrom $150.00 per month, to his wife for her life and the balance to him. Upon his death the trustee was to divide the trust fund, set apart therefrom a fund sufficient to continue said monthly payments to his wife for life, and the balance of the original trust corpus was then to go to the settlor's issue per stirpes and in default of issue to those who would be entitled thereto under the laws of New York, if the settlor had then died intestate, another way of saying "to his heirs." The term "heir" as now commonly used in this country, is no longer limited as at common law but it generally includes all those who by grace of the local statutory law may be entitled to succeed to the estate of one who may die intestate. "Heirs", however, in any event may succeed only by grace of some statutory law. In the *Irving* case, therefore, there was the chance that the settlor might outlive the remaindermen, his issue or, in default of

issue, his heirs, however remote that chance might be. The chance that Mrs. Girvin, a woman about 62 years of age when she made her transfer in 1924, might outlive her two children and her five grandchildren was, in the opinion of the Circuit Court of Appeals for the Ninth Circuit, sufficient to make the corpus of her trust taxable under Section 811(c) I.R.C. The chance that the settlor in the *Irving* case might survive his issue and those who might have become his heirs was *not* sufficient in the opinion of the Circuit Court of Appeals for the Second Circuit to make the corpus of the trust in the *Irving* case taxable under Section 811(c) I.R.C. There is, therefore, apparently, a conflict of opinion, too, between these two Circuit Courts of Appeals.

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4. AN IMPORTANT QUESTION OF FEDERAL LAW AND THE ADMINISTRATION THEREOF NEEDS CLARIFICATION AND ALSO INVOLVES RESPECT FOR "DUE PROCESS".

Unfortunately ever since the decision of this Court in *Helvering v. Hallock,* 309 U. S. 106, 60 Sup. Ct. 444, there has been considerable confusion regarding the scope of that decision, particularly with regard to its effect on *May v. Heiner* and on trusts made prior to March 3, 1931, where the settlor reserved a life estate, with remainders over. In the *Irving* case the Circuit Court of Appeals for the Second Circuit referred to the recent frequent efforts of the government to secure the overruling of *May v. Heiner.* In the case of *United States v. Brown,* 134 Fed. (2d)

372, a case similar to *May v. Heiner,* the Circuit Court of Appeals for the Ninth Circuit declared that the Supreme Court had not expressly or by necessary implication overruled *May v. Heiner* in *Helvering v. Hallock,* and its decision in the *Brown* case was in accord with the decision of this Court in *May v. Heiner.* The decision of the Circuit Court of Appeals for the Ninth Circuit in the pending case, affecting Mrs. Girvin's trust is in conflict, we suggest, not only with *May v. Heiner* but with its own decision in *United States v. Brown.* The United States District Court for the Northern District of California, Southern Division, in March of this year in *Gamble v. The United States,* 65 Fed. Supp. 114, held that the corpus of a trust created in 1927 in which the settlor reserved a life estate to himself with remainders over to his children or grandchildren or their heirs was not taxable under Section 811(c) I. R. C.

There are some, we know, and we believe there are many cases of such trusts, made prior to the Joint Resolution of March 3, 1931, now pending in the Tax Court and in the United States District Courts and in Circuit Courts of Appeals, awaiting a clarification of the confusion which now exists.

May v. Heiner was accepted as law by this Court in *Burnet v. Northern Trust Co.,* 283 U. S. 782, 51 Sup. Ct. 342, *Morsman v. Burnet,* 283 U. S. 783, 51 Sup. Ct. 343, and *McCormick v. Burnet,* 283 U. S. 784, 51 Sup. Ct. 343, construing Section 402(c) of the Revenue Act of 1921, and Section 302(c) of the Revenue Act of 1924. Those decisions were what stimulated

the Joint Resolution of March 3, 1931. *May v. Heiner,* was accepted law in *Hassett v. Welch,* supra. In that case the Court held that the estate tax authorized by the Joint Resolution of March 3, 1931, was not meant to be laid on estates of all who died after the adoption of that resolution, and that on the contrary it was directed only to those trusts created or transfers made after the passage of that resolution. This Court in *Hassett v. Welch* reviewed the history of these amendments and declared that both the Commissioner who had prepared them and the Congress which passed them had only intended a prospective operation for them. The Congress had hesitated for fear that a retroactive effect might be a violation of the due process of law clause of the Fifth Amendment to the Constitution. The Congress therefore accepted as law the construction placed on Section 402(c) of the Revenue Act of 1918 by this Court in *May v. Heiner* and by this Court recognized again in the three decisions cited above, which were concerned with the like Section 402(c) of the Revenue Act of 1921 and the other like Section 302(c) of the Revenue Act of 1924. The only legislative changes in the law so construed by this Court, were changes which were to operate prospectively as to transfers made or trusts created after the passage of the said Joint Resolution of March 3, 1931, or after the Revenue Act of 1932.

If the Congress had attempted to give a retroactive effect to said Joint Resolution or said Revenue Act of 1932, it would, in the opinion of the Circuit Court of Appeals for the First Circuit (*Welch v.*

Hassett, 90 Fed. (2d) 833) have deprived persons of property without due process of law in violation of the Fifth Amendment to the Constitution.

If the Revenue Acts, as they read prior to the amendment of Section 302(c) of the Revenue Act of 1926 by the Joint Resolution of March 3, 1931 had been retroactively amended by that resolution so as to affect transfers or trusts made prior to that amendment and therefore non-taxable for estate tax purposes, such retroactive legislation would be "so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment" to the Constitution (*Nichols v. Coolidge,* 274 U. S. 531, 542, 47 Sup. Ct. 710, 714). To like effect see *Coolidge v. Long,* 282 U. S. 582, 51 Sup. Ct. 306. In that case there was involved the application of a state inheritance tax act to the irrevocable transfer of property by a trust reserving a life estate in the income to the settlors, with remainders over. It was held that any attempt to make that inheritance tax retroactive would violate the due process clause of the Fifth Amendment, where the act was applied to the estate of one dying after the passage of the act but whose transfer was completed before the passage of the act. By the same reasoning any legislative or administrative attempt to tax the corpus of a trust in 1941 that was non-taxable by the law in force, when that trust transfer was completed in 1924, would be in violation of "due process."

If a Circuit Court of Appeals has by its judicial decree, through error, inadvertently done what the

Congress could not lawfully do by its own act, that question seems in itself to be one justifying the issue of a writ of certiorari, particularly where it affects an administrative matter of so much general importance as the tax issue here.

Some of the confusion and uncertainty that exists, with regard to the question here, is due to the implications of the amendments stemming from the Joint Resolution of March 3, 1931 and the Revenue Act of 1932. There is implicit in these prospectively operating amendments a purpose to authorize the imposition of estate taxes on transfers or trusts which though in fact non-testamentary in character, may, as declared by this Court, for the purpose of the tax, be treated by the Congress as "testamentary transfers". (*Helvering v. Bullard,* 303 U. S. 297, 58 Sup. Ct. 565.) In other words, transfers made after March 3, 1931, may be treated as "testamentary transfers" by legislative fiat, though they are actually non-testamentary in character, within the meaning of the Revenue laws, as they read prior to March 3, 1931.

But prior to these changes initiated in 1931 a transfer to be taxable as revealed in *May v. Heiner* must have some real testamentary character, and lacking such a character the transfer was not taxable. That principle of non-taxability is implicit in the decision in *May v. Heiner* and in its forerunner *Reinecke v. Northern Trust Co.,* and also in such later decisions as *Klein v. United States,* 283 U. S. 231, 51 Sup. Ct. 398; *Helvering v. Hallock,* 309 U. S. 106, 60 Sup. Ct. 444;

Commissioner v. Estate of Field, 324 U. S. 113, 65 Sup. Ct. 511, and *Fidelity Co. v. Rothensies,* 324 U. S. 108, 65 Sup. Ct. 508, in all of which later decisions there was some deliberate reservation or "string" suggesting testamentary character.

The distinction between the case of the settlor who may become revested of the corpus of his trust by reason of his own reservation in his trust deed, and the case of the settlor who by no act or reservation of his own may become revested of the corpus of his trust by mere operation of law is a real and a substantial distinction—it is the distinction between a transaction that in some measure is in itself testamentary in character and one on the other hand that in itself is non-testamentary in character. This distinction should not be ignored when the yardstick by which taxability is to be determined is whether the trust created by the settlor is "*intended* to take effect in possession or enjoyment at or after his death", within the meaning of that statutory phrase as it has been construed in *May v. Heiner.* (Emphasis ours.)

The Commissioner in section 81.17 (Treas. Reg. 105) as it read when the Circuit Court of Appeals reversed the decision of the Tax Court in this case, says, so far as pertinent to the questions in this case, that the statutory phrase, heretofore quoted,

> "includes a transfer by the decedent prior to his death * * * whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust) * * * is not to pass from

> the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; * * * In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer." (R. 56).

Those regulations as applied to trusts created since the Joint Resolution of March 3, 1931 or the Revenue Act of 1932 with their prospectively operating amendments could probably escape challenge. But those regulations are in flagrant conflict with the decision of this Court in *May v. Heiner,* if applied to a trust created prior to March 3, 1931, and if so applied would have the purpose and in some cases the effect to deprive persons of property without due process of law, and would represent an effort at legislation by the Commissioner in a field which the Congress declined to invade out of respect for the "due process" clause of the Fifth Amendment to the Constitution.

The Tax Court in the Girvin estate found as a fact that Mrs. Girvin's transfer was not "made * * * in contemplation of * * * death" within the meaning of that phrase as used in the applicable Revenue Act (R. 31-32). That finding we suggest is binding here, as it was in the Circuit Court of Appeals. (*Dobson v. Commissioner,* 320 U. S. 489, 64 Sup. Ct. 239.) This phrase in Section 302(c), Revenue Act 1924, and in 811(c) I.R.C., is a part of the larger phrase reading "in contemplation of or intended to take effect in possession

or enjoyment at or after his death." To make the property transferred taxable, "the dominant, controlling or impelling motive" must be the thought of death (*United States v. Wells,* 283 U. S. 102, 118, 51 Sup. Ct. 446, 452; *Allen v. Trust Co. of Georgia,* 66 Sup. Ct. 389), rather than such purposes associated with life as the desire to avoid the care and trouble involved in the management of the widow's half of community property (R. 28), which was the motivating force here.

Where the transfer made or the trust created cannot, as a fact, be regarded as made in contemplation of death, it cannot be said to have been "*intended* to take effect in possession or enjoyment at or after" the death of the settlor, as that language was used in section 302(c), Revenue Act of 1924, and as it was construed in *May v. Heiner* and *Morsman v. Burnet.* (Emphasis ours.)

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5. MAY v. HEINER HAS NOT BEEN OVERRULED EXPRESSLY OR BY NECESSARY IMPLICATION AND IS STILL THE LAW.

May v. Heiner was not overruled by the decisions of this Court in *Klein v. United States* or in *Helvering v. Hallock.* In the *Klein* case a reversion in fee was reserved to the grantor. The grantor had created a life estate for his wife and provided in the deed for a reversion to himself, his heirs and assigns if he survived his wife; otherwise, upon his death, the reversion was to go to his wife. In the *Hallock* cases, too, all

the trusts involved "dispositions of property by way of trust in which the *settlement provides for a return or reversion of the corpus* to the donor upon a contingency terminable at his death" (309 U. S. at page 110, 60 Sup. Ct. at page 447) (emphasis ours); thereby actually revealing the intentions of the donor and their testamentary character.

The decisions of the Supreme Court in *Fidelity Co. v. Rothensies,* 324 U. S. 108, and *Commissioner v. Field,* 324 U. S. 113, are not in conflict with the view here expressed. In both cases this Court *first* determined that the decedent's express retention of a string over all the trust property justified its inclusion in the gross estate. In the *Fidelity* case this Court expressed its conclusion on this point as follows (p. 111):

> "Thus until the moment of her death or until an undetermined time thereafter the decedent held a string or contingent power of appointment over the total corpus of the trust. *The retention of such a string,* which might have resulted in altering completely the plan contemplated by the trust instrument for the transmission of decedent's property, subjected the value of the entire corpus to estate tax liability." (Emphasis ours.)

In the *Field* case the trust expressly provided that upon termination the corpus was to be paid to the decedent. This Court justified the inclusion of the trust property in the gross estate in the following language (p. 115):

> "The trust here was limited in duration to the lives of the decedent's two nieces. *But if both*

> *nieces died before the decedent, the corpus would have been paid to the decedent rather than to the beneficiaries named in the trust instrument* (in this instance the decedent's sister and the issue of his deceased brother). Thus until decedent's death it was uncertain whether any of the corpus would pass to the beneficiaries or whether it would revert to the decedent. *Decedent retaining a string attached to all the property until death severed it, the entire corpus was swept into the gross estate and was taxable accordingly.*" (Emphasis ours.)

Having determined in both cases that the decedent's *express* retention of a string brought the trust property within the gross estate, this Court next turned to a consideration of the *measure of the tax,* and it was in this connection that this Court expressed its opinion that the probability of the property returning to the decedent was immaterial. Thus in the *Fidelity* case this Court said (pp. 111-112):

> "It is fruitless to speculate on the probabilities of the property being distributed under the contingent power of appointment. Indeed, such speculation is irrelevant *to the measurement of estate tax liability.* The application of this tax does not depend upon 'elusive and subtle casuistries'. Helvering v. Hallock, supra, 118. No more should the *measure of the tax* depend upon conjectures as the propinquity or certainty of the decedent's reversionary interest. * * * The value of the property subject to the contingency, rather than the actuarial or theoretical value of the possibility of the occurrence of the contingency *is the measure of the tax.*" (Emphasis ours.)

And the statement in the *Field* case, at page 116, that

> "It makes no difference how vested may be the remainder interests in the corpus or how remote or uncertain may be the decedent's reversionary interest"

was made in considering the question of the *measure* of the tax.

In both the *Fidelity* case and the *Field* case, therefore, this Court first pointed out that the decedent had retained in the trust instrument a string over the corpus of the trust and that this justified the inclusion of the corpus in the gross estate as a transfer intended to take effect at death. This Court then held in both cases that the full value of the corpus of the trust should be included in the gross estate and that the degree of remoteness of the contingency under which the property might have returned to the decedent is immaterial *for the purpose of measuring the tax.* In both cases the lower Courts had held that the transfer was intended to take effect at death. The only question involved was whether the entire value of the corpus of the trust should be included in the gross estate. These two cases are authority for the proposition that where the decedent has expressly retained in the trust instrument a string over the property, the entire value of the trust corpus must be included in the decedent's estate. They do not support the proposition that the mere possibility that the trust corpus might return to the decedent by operation of law is sufficient to justify the imposition of the tax.

That the settlor's intention should not be implied because of a remote possibility that the trust corpus might return to the settlor by operation of law has been well expressed by Judge Littleton in his concurring opinion in *Central Hanover Bank & Trust Co. v. United States,* 58 Fed. Supp. 565 (Ct. Cls., 1945), as follows:

> "* * * the transfer when made was absolute and irrevocable, and any possibility of reversion to the grantor through the prior death of the named beneficiaries, including their issue, *was too remote to justify the taxing authorities implying an intention* on the part of the donor to reserve a reversionary interest of such a character as would justify the Government in including the value of the trust property in the gross estate for the purpose of the excise tax upon a transfer '*intended* to take effect in possession or enjoyment at or after death' within the meaning of the taxing act.
>
> "I think the rule announced in Helvering v. Hallock, 309 U. S. 106, *where a reversionary interest was explicitly retained, should not be extended by implication and without proof that such was the intention of the donor.*" (Emphasis ours.)

The question raised here for the reasons assigned is, in our opinion, one of sufficiently general and public importance to justify the issue of the writ of certiorari as prayed by the petitioner.

WHEREFORE the petitioner submits that the Circuit Court of Appeals for the Ninth Circuit erred in its decision and that this petition for a writ of cer-

tiorari should be granted so that the decision can be reversed.

Dated, San Francisco, California,
June 26, 1946.

Respectfully submitted,

ALLEN G. WRIGHT,
RANDELL LARSON,
EDWARD HALE JULIEN,
Attorneys for Petitioner.

(Appendix Follows.)

Appendix

1. *Constitution—Fifth Amendment:*

"No person shall be * * * deprived of life, liberty or property without due process of law * * *"

2. *Revenue Act of 1918:*

Sec. 401. "That * * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent * * *"

Sec. 402. "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *"

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) except in case of a bona fide sale * * *"

3. *Revenue Act of 1924* (effective June 2, 1924):

Sec. 301(a). "In lieu of the tax * * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent * * *"

Sec. 302. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *"

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale * * *"

4. *Revenue Act of 1926:*

Sec. 301(a). "In lieu of the tax * * * a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent * * *"

Sec. 302. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *"

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale * * *"

5. *Sec. 302(c), Revenue Act of 1926,* as amended by the Joint Resolution of March 3, 1931:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust

or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom,* except in case of a bona fide sale * * *" (Emphasis ours, to show to what extent the 1931 amendment changed the wording of Sec. 302(c), Revenue Act of 1926.)

6. *Sec. 302(c), Revenue Act of 1926,* as amended by the Joint Resolution of March 3, 1931 and by Sec. 803(a) of the Revenue Act of 1932:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *or of which he has at any time made a transfer, by trust or otherwise,* under which *he* has retained for his life or for any period *not ascertainable without reference to his death or for any period which does not in fact end before his death* (1) the possession or enjoyment of, or *the right to* the income from, the property, or (2) the right, *either alone or in conjunction with any person,* to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale * * *" (Emphasis ours, to show to what extent the 1932 amendment changed the wording of Sec. 302(c), Revenue Act of 1926, as amended in 1931 as aforesaid.)

7. *Sec. 811(c), Internal Revenue Code:*

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale * * *"

8. *California Civil Code* (as in force in 1924 and 1925):

Sec. 2280. "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

Note: The amendment to this section in 1931 contained the following sentence, "Trusts created prior to the date when this act shall become a law shall not be affected hereby." (Calif. Stats. 1931, p. 1955.)

CERTIFICATE OF COUNSEL.

I, Allen G. Wright, one of the attorneys for the petitioner in the foregoing petition for a writ of certiorari, do hereby certify that said petition is not interposed for delay and that in my judgment it is well founded.

Dated, San Francisco, California,
June 26, 1946.

ALLEN G. WRIGHT,
Of Counsel for Petitioner.